Supreme Court, U.S.
FILED
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1812

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

CLIFFORD J. ANTONE,

Petitioner,

v.

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL E. TIGAR
(Counsel of Record)
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

AMANDA G. BIRRELL
1901 Yaupon Valley Road
Austin, Texas 78746
(512) 328-2810

Attorneys for Petitioner, Clifford J. Antone

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

CASES:	Page
United States v. Boatright, 588 F.2d 471 (5th Cir. 1979)	2
United States v. Coronado, 554 F.2d 166 (5th Cir.), *cert. denied*, 434 U.S. 870 (1979)	2
United States v. Darling, 766 F.2d 1095 (7th Cir. 1985)	1, 2
United States v. Dayton, 604 F.2d 931 (5th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980)	3
United States v. Helstoski, 442 U.S. 477 (1979)	3
United States v. Wetterlin, 583 F.2d 346 (7th Cir. 1978)	2
RULES:	
Federal Rule of Criminal Procedure 11	2, 3
Supreme Court Rule 17.1(a)	2
Supreme Court Rule 22.6	1
OTHER AUTHORITIES:	
1 Devitt & Blackmar, *Federal Jury Practice and Instructions*, c. 8 (3d ed. 1977)	3
2 Devitt & Blackmar, *Federal Jury Practice and Instructions*, §§ 27.01; 27.04 (3d ed. 1977)	3

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

No. 84-1812

CLIFFORD J. ANTONE,

Petitioner,

v.

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Clifford J. Antone, by undersigned counsel and pursuant to Supreme Court Rule 22.6, files this supplemental brief.

The Solicitor General has sought to trivialize the guilty plea issue tendered in the petition. A recent decision shows that the issue is far more important than he thinks. In *United States v. Darling*, 766 F.2d 1095 (7th Cir. 1985), the court of appeals reversed a conviction for failure to inform the defendant of and ensure that he understood the nature of the conspiracy charge to which he pled guilty. The court also faulted the factual basis for the plea.

The *Darling* court cited with approval and applied many of the cases that the Fifth Circuit ignored in disposing of Antone's case. See, e.g., 766 F.2d at 1098-99, citing *United States v. Wetterlin*, 583 F.2d 346 (7th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979); *United States v. Coronado*, 554 F.2d 166 (5th Cir.), *cert. denied*, 434 U.S. 870 (1977); *United States v. Boatright*, 588 F.2d 471 (5th Cir. 1979).

Darling holds that a district judge has "an affirmative duty to inform [the defendant] of and determine that he understood the nature of the conspiracy charge." 776 F.2d at 1098. The Fifth Circuit declined to impose such a requirement. Both the Fifth Circuit and the Solicitor General seem to believe that being represented by counsel, and having ritual words of art like "conspiracy" bandied about are a substitute for the informing and fact-determining function that Rule 11's mandatory terms visit upon district judges.

Darling, expressing a view shared by other courts of appeals, disagrees. Darling's attorney informed the district court that he and his client had had "'a number of discussions,'" 776 F.2d at 1097, about the plea, but this did not cure the failure to make a record that Darling understood the charge and that there was a factual basis for entering judgment on it.

There are some differences between *Darling* and this case. In *Darling*, the defendant waived formal reading of the information. However, Darling participated in the colloquy leading to determination of the factual basis of the plea, as Antone did not. *See* Petition, p. 4.

On this basis, we believe ourselves justified in saying that the decision of the Fifth Circuit is "in conflict with the decision of another federal court of appeals on the same matter." Supreme Court Rule 17.1(a).

We iterate: Guilty pleas have been the mainstay of the federal criminal courts, accounting for more than three-fourths of all felony dispositions. Given the 1983 amendment to Rule 11 (see Advisory Committee Notes), the guilty plea is expected to fulfill an even more important role as defendants no longer need to stand trial in order to preserve pretrial claims that are not subject to interlocutory review.

To permit a defendant to condemn himself without scrupulous adherence not only to Rule 11 but also to the canon that all relinquishments of right must be clearly shown, see, e.g., *United States v. Helstoski*, 442 U.S. 477, 491 (1979), is (as we observed in the Petition) untenable in a "decent system of criminal justice." *United States v. Dayton*, 604 F.2d 931, 935 (5th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

Because *Darling* and this case present a conflict worthy of resolution, we suggest a starting point for analysis. When a jury is asked to determine guilt or innocence, words of art such as "conspiracy" must be—and are—explained to that body of twelve lay persons by the trial judge, so that they may make an informed decision. *See generally* 1 Devitt & Blackmar, *Federal Jury Practice & Instructions* c. 8 (3d ed. 1977); 2 *id.* at secs. 27.01, 27.04. This is the case even though experienced lawyers are going to argue the facts and law in summation. We submit that a single lay person—the defendant—who is about to admit guilt should be given the same kind of explanation.

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition, it is respectfully prayed that a writ of certiorari issue.

Respectfully submitted,

MICHAEL E. TIGAR
(*Counsel of Record*)
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

AMANDA G. BIRRELL
1901 Yaupon Valley Road
Austin, Texas 78746
(512) 328-2810

Attorneys for Petitioner,
Clifford J. Antone